

EXHIBIT C

SCEG DEFICIENCY LETTER TO K. CHAD BURGESS

W Y C H E

Attorneys at Law

July 17, 2018

VIA Email Only

K. Chad Burgess, Esquire
South Carolina Electric & Gas Company
Chad.burgess@scana.com

Re: Discovery Responses of the Joint Applicants in
Joint Application and Petition of South Carolina Electric & Gas Company and Dominion Energy, Inc., Docket No. 2017-370-E

Dear Chad,

I am writing on behalf of the Office of Regulatory Staff (“ORS”) about the remaining deficiencies in the Joint Applicants’ responses to the discovery requests and Audit Information Requests issued by ORS pursuant to its statutory authority¹ and the rules of civil procedure in the above-referenced matter. The deficiencies in the Joint Applicants’ production on July 6, 2018, include only certain hard copy documents and a confidential privilege log (the “Privilege Log”) in response to the Public Service Commission’s Order No. 2018-73-H dated June 21, 2018 (the “Order”).

Collectively, the deficiencies demonstrate the Joint Applicants’ failure to comply with not only the discovery requests but also the applicable statutes, rules, and the PSC’s Order. Unless these deficiencies are corrected by 3:00 PM this Friday, July 20, ORS will have to file a motion for sanctions based on continued non-compliance that is also causing additional fees and costs and fees to be incurred as a result.

Please note that the deficiencies identified below are solely those that ORS has been able to identify as of the date of this letter. ORS continues to review the July 6 & 13, 2018 productions and the Privilege Log that were ordered by the PSC and will identify additional deficiencies when possible.

Ongoing Deficiencies in the Format of Document Productions

As the Joint Applicants are well aware, ORS has made clear in all its Requests that Joint Applicants are to provide multiple copies of responsive documents in three specified formats, namely (i) “seven (7) paper copies/binders of responses,” (ii) four (4) sets of CDs² “with each containing a set of the responses *in searchable format*,” and (iii) one (1) set of responses loaded into the e-

¹ See S.C. Code §§ 58-4-50(a)(2), 58-4-55(A), 58-27-160, 58-27-1570, 58-27-1580, and 58-33-277.

² ORS modified its earlier requests for flash drives and indicated it would accept CDs in the alternative, after Joint Applicants raised concerns about the difficulties of providing flash drives.

W Y C H E

Page 2
July 17, 2018

room. Joint Applicants have, however, continued to ignore portions of these instructions. Most important to ORS is that the CDs provided have not been in searchable format and the spreadsheets provided have not all been in workable format.³

Electronic copies of documents, and particularly working or “live format” copies of all spreadsheets (to include all formulae and calculations) are critical for ORS to perform its analysis. Recognizing this, the Order specifies that “SCE&G shall produce . . . documents in ‘native format’ *as much as possible*, i.e. the original electronic format of the information, with image and text load files.” (Order at 2 (emphasis added))

The Joint Applicants’ recent production of responses in only hard-copy documents to Request Nos. 4-66, 4-72, and 4-73 is an example of the continuing failure to provide documents in the requested format. Beyond the general instructions applicable to these three requests, the specific wording of each request makes clear that “live format” models are to be provided, but none has been provided to date. This is a failure to respond to requests that have been ordered to be produced.

The Joint Applicants’ ongoing disregard of the instructions of ORS and the order of the PSC to provide documents in the specified format shows a disturbing and cavalier attitude towards the seriousness of this proceeding and a disregard for the necessity of ORS to have the information and tools it needs to perform the required analysis and evaluation for presentation to the PSC on the affirmative relief the Joint Applicants are seeking.

Ongoing Failures to Respond to Requests Addressing the Tax Cuts and Jobs Act of 2017

In addition to failing to provide documents in the requested format, the Joint Applicants have also failed to adequately respond to requests addressing the new federal Tax Cuts and Jobs Act of 2017, despite repeated assurances that such responses would be forthcoming. In its May 9, 2018 deficiency letter, ORS specifically identified Joint Applicants’ responses to Request Nos. 1-119, 1-174, 4-82, 4-83 as inadequate, and Joint Applicants explained in their letter dated May 16, 2018, that they were “continuing to evaluate the effects of federal tax reform” and would “supplement promptly” once such analysis was complete. Two more months have now passed, no such response has been made, and ORS attempted – yet again – to secure this information through No. 7-22 and Utility Rates Request # 7. SCE&G responded to Utility Rates Request # 7 by e-mail on July 12, 2018, stating “SCE&G has not yet completed its review and evaluation of the Tax Cuts

³ ORS also received only one set of the confidential information provided on July 6 and July 13, 2018, but is willing to accept this lesser number of copies of confidential information provided the other production deficiencies as indicated in this letter are promptly addressed.

W Y C H E
PROFESSIONAL ASSOCIATION

801 Gervais Street, Columbia, SC 29201-3155
p: 803.254.6542 | f: 803.254.6544
www.wyche.com

W Y C H E

Page 3
July 17, 2018

and Jobs Act on its electric business. As a result, SCE&G does not expect to be in a position to provide responses to ORS Utility Rates Request #7 until the week of July 30, 2018.”

ORS notes that other utilities⁴ asked to provide *the same information* about the impact of the recent federal tax law in connection with other matters before the PSC have all completed their work, with many having provided this information months ago. More troubling still, on April 16, 2018 – nearly three months ago – SCE&G stated in another action before the PSC that it anticipated being able to comply with a proposed May 1, 2018 deadline for providing information about the savings to SCE&G resulting from the new act, and how to return these savings to customers. (See April 16, 2018 Letter of SCE&G in Dkt. No. 2017-381-A.)

The Joint Applicants have had more than ample time to complete the work required to respond to Request Nos. 1-119, 1-174, 4-82, 4-83, 7-22, and Utility Rates Request # 7. Continued delay is unjustified, and ORS can only surmise that the withholding of the tax impact information for SCE&G’s electric operations is solely for tactical advantage in these or other contemporaneous proceedings. This delay prejudices the ability of ORS to complete its work of evaluation and verification on the compressed timeline with which all the parties are confronted.

Inadequate and Overbroad Claims of Privilege

The Privilege Log provided on July 6, 2018, demonstrates that the Joint Applicants are making misleading and overbroad claims of privilege, as well as claiming that privilege applies to certain documents for which the Joint Applicants have already *and explicitly* waived the privilege.

As a preliminary matter, Joint Applicants bear the burden of establishing that every document on the 49-page Privilege Log is privileged. *See State v. Love*, 275 S.C. 55, 59, 271 S.E.2d 110, 112 (1980) (“In general, the burden of establishing the privilege rests upon the party asserting it.”).

To date, ORS has identified the following groups of documents from the Privilege Log as wrongfully withheld.

⁴ SCE&G’s gas operations provided the information regarding the impact of the Tax Cuts Jobs Act to ORS on June 15, 2018. It is difficult to believe that SCE&G completed its review and estimates for gas operations but not electric.

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Page 4
July 17, 2018

1. Documents Responsive to Request Nos. 2-5, 6-6, 6-7, and 6-9:⁵ Bechtel-Related Documents.

In their filing dated June 11, 2018, the Joint Applicants unequivocally waived the privilege for communications related to the Bechtel Reports. Specifically, the Joint Applicants stated that “SCE&G, through its parent company SCANA, has decided to produce documents that provide the full account of the Bechtel engagement and assessment, including the communications related to the engagement of Bechtel and the ensuing Bechtel Report.” (Joint Applicants’ Response at 5) In addition, the Order states that SCE&G “shall produce” the Bechtel-related documents by July 6, 2018. (Order at 2)

Review of the Privilege Log clearly shows, however, that the Joint Applicants wrongfully continue to assert a privilege over documents that are related to the Bechtel Reports and that are necessary to provide – in the Joint Applicants’ own words – a “full account of the Bechtel engagement and assessment.” These include but are not limited to those log entries listed on Exhibit A.⁶

2. Documents Responsive to Request No. 5-26

Over 80% of the entries on the Privilege Log are indicated as responsive to Request No. 5-26, which seeks “information concerning analyses and case studies prior to the decision to abandon the NND Project.” Log entries falling under this objection include those listed on Exhibit B. Claims of privilege over these documents are meritless for at least four reasons.

First, this request seeks information inherently related to the ordinary course of business, not attorney-client advice or litigation work product. More specifically, documents responsive to Request No. 5-26 concern the economic viability of the NND project and the business rationale or prudence of continuing or abandoning it. Indeed, the vast bulk of the Privilege Log entries responsive to Request No. 5-26 *admit* this fact in describing the withheld communication as

⁵ Request No. 6-8 also seeks documents related to the Bechtel Report, but ORS would note (as further discussed) that no Privilege Log entries appear to address this request, nor have any documents been provided and identified as responsive to it.

⁶ If Joint Applicants’ have some “independent basis” for claiming privilege over certain of the documents listed on Exhibit A (*see* Joint Applicants Response at 5 n.5), that basis is not evident from the Privilege Log, nor are the descriptions of the documents provided therein sufficient to allow ORS to evaluate such “independent basis.” For these reasons, ORS concludes there is no such “independent basis” that applies to any of these documents.

W Y C H E
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801 Gervais Street, Columbia, SC 29201-3155
p: 803.254.6542 | f: 803.254.6544
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Page 5
July 17, 2018

“regarding the viability of the project post WEC-bankruptcy.” Neither attorney-client nor work product protections extend to such discussions. The Fourth Circuit has succinctly explained that “materials prepared in the ordinary course of business or pursuant to regulatory requirements. . . do not constitute documents prepared in anticipation of litigation protected by [] privilege.” *Solis v. Food Employers Labor Relations Ass’n*, 644 F.3d 221, 232 (4th Cir. 2011).

Second – and further corroborating the business-related nature of these communications – many (if not most) of the documents logged as responsive to Request No. 5-26 involve no attorneys whatsoever, but are merely communications between or among management. *See, e.g.*, Privilege Log entries nos. 242-246, 252-268. A claim of privilege over mere business discussions among management is unjustified.

Third, for those few documents logged as responsive to Request No. 5-26 that actually do involve internal or external counsel, merely including an attorney or attorneys among the recipients does not automatically privilege a communication. Instead, for the privilege to apply, the primary purpose of the communication must have been to solicit legal, not business, advice. *See Imperial Textile Supplied Inc. v. Hartford Fire Ins. Co.*, 2011 WL 1743751, at *2 (D.S.C. May 5, 2011). In addition, “Where business and legal advice are intertwined, the legal advice must predominate for the communication to be protected.” *Neuberger Berman Real Estate Income Fund, Inc. v. Lola Brown Trust No. 1B*, 230 F.R.D. 398, 411 (D. Md. 2005). Assuming *arguendo* that some of the documents involving an attorney have privileged discussions, these documents should be produced in redacted form, omitting from redactions ordinary course of business discussions and communications between non-attorneys, so that only truly privileged discussions (if any) are withheld.

Fourth, and again assuming *arguendo* that claims of privilege and work product protection would apply to the business-related documents responsive to Request No. 5-26, the Joint Applicants have waived such protections through other disclosures to ORS. As SCE&G is aware, in July 2017 SCE&G provided to ORS’s consultant Norm Richardson case studies and analysis concerning completing Unit 2 and abandoning or delaying Unit 3. The case studies and analysis provided in July 2017 are a portion of the same larger set of information now sought in Request 5-26. The Joint Applicants’ cannot now withhold these and related documents under an assertion of privilege.

3. Miscellaneous Objections to Log Entries

In addition to the objections identified above, Privilege Log Entry No. 78 presents another example of problems with the Privilege Log. This document is described as an invoice for legal services, and one moreover related to the Bechtel Report and therefore not privileged. Even if it were

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PROFESSIONAL ASSOCIATION

801 Gervais Street, Columbia, SC 29201-3155
p: 803.254.6542 | f: 803.254.6544
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Page 6
July 17, 2018

privileged, such invoice should, at a minimum, be provided in redacted form, with only attorney-client communications removed.

Deficiencies in and Complete Omissions from the Privilege Log

In addition to the unjustified and overbroad claims of privilege noted above, ORS has identified other deficiencies in the Privilege Log. These include complete omissions from the Privilege Log as well as deficiencies in the format.

With respect to omissions, SCE&G previously stated that for Request Nos. 4-27, 6-8, and 6-16, it would be providing responsive documents or a privilege log of documents responsive to these requests. (*See* SCE&G Response to Motion to Compel at 5 & 32-33) The Order unequivocally requires the same. (*See* Order at 2 & 3) To date, the Joint Applicants have provided no response to these requests. At this point, any objections have been waived, and the Joint Applicants may not withhold any responsive documents on grounds of privilege, because the Privilege Log wholly omits any log entries of documents responsive to these requests.

With respect to the format of the Privilege Log, no Bates Stamp numbers or other identifying information has been provided for those documents that are indicated as “redacted”. As such, it is impossible for ORS to determine whether such redacted documents have actually been provided, and this in turn hampers the ability of ORS to weigh the legitimacy of any redactions.

Last, the Joint Applicants are wrong to designate the Privilege Log itself as Confidential. There is no basis for this designation, as the Privilege Log contains no information that is even arguably proprietary, commercially sensitive, or otherwise confidential in nature. The Privilege Log merely shows that a communication occurred between certain parties at a certain time concerning a broadly described subject matter; such information is factual and general in nature, not confidential.

Additional Deficiencies in the July 6, 2018 Production

Beyond the problems identified above, the Joint Applicants’ responses to other requests are either lacking or inadequate. In brief:

- **Request No. 1-20:** ORS’s May 9, 2018 deficiency letter indicated that the response provided to this Request was inadequate. The Joint Applicants responded on May 16, 2018, stating that they “would supplement promptly the responses to request 1-20.” To date no such supplement has been received.

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801 Gervais Street, Columbia, SC 29201-3155
p: 803.254.6542 | f: 803.254.6544
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Page 7
July 17, 2018

- **Request No. 1-22:** Three groups of responsive documents are missing from the production, specifically (i) "Written Consents" for Jan. 13, 2015; Dec. 29, 2016; Aug. 14, 2017; Oct. 12, 2017; and Oct. 13, 2017; (ii) Jan. 2, 2018 Telephonic Meeting Minutes; and (iii) Feb. 12, 2018 Board Meeting Minutes. Counsel for SCE&G was informed of these deficiencies during the week of July 9, 2018, and ORS anticipates a follow-up from SCE&G, but to date they have not been corrected.
- **Request No. 1-44:** A response with amalgamated information was provided, but this information was not broken down year-by-year as requested and needed.

Conclusion

Prompt attention to the objections and deficiencies identified above is needed if the Joint Applicants wish to avoid further discovery motions before the PSC and the possibility of sanctions. We request the supplemental and corrected responses and production by 3:00 PM this Friday.

Most respectfully,



Matthew T. Richardson
mrichardson@wyche.com

W Y C H E
PROFESSIONAL ASSOCIATION

801 Gervais Street, Columbia, SC 29201-3155
p: 803.254.6542 | f: 803.254.6544
www.wyche.com

EXHIBIT A

<u>Doc. Nos.</u>	<u>Request No.</u>
76-79; 347-348; 354-355; 357-364; 438	6-6
71-74	6-7
2; 7; 8; 9-10; 36-70; 75	6-9

EXHIBIT B

<u>Doc. No.</u>	<u>Request No.</u>
80 - 346	5-26
365 - 437	5-26
439 – 504	5-26